



IRCP

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Prof. Dr. Gert Vermeulen – European Legal Framework for Active Cross-Border Search of Fugitives – 9 September 2010

Towards a European Legal Framework for Active Cross-Border Search of Fugitives

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First Expert Seminar of the European Network of the
Fugitive Active Search Teams (ENFAST)

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Structure

- > preliminary observations
 - > fugitive
 - > not (mere) police issue
- > a journey from passive to active cross-border search mechanisms in international cooperation instruments in Europe
 - > passive search
 - > moderately active search
 - > genuinely active search
- > recommendations for EU action



Fugitive

- generic 'operational' term encompassing all fugitives, i.e. (alleged) offenders (suspects and convicted persons)?
- or focused on/limited to convicted persons who try to avoid enforcement of their penalty involving deprivation of liberty by having escaped or having fled from the country of conviction?
- difference is highly significant
 - suspects: no particular problems arise, in that regular search mechanisms, mutual legal assistance (MLA) and other cross-border cooperation instruments can be used – websites not
 - convicted criminals: regular passive (websites doubtful) and moderately active search mechanisms may be used – use of genuinely active search mechanisms doubtful and very limited, both in European/international & domestic law



Not (mere) police issue

- > sometimes also an issue for border control authorities, customs authorities and intelligence services
- > almost necessarily an issue for judicial authorities
 - > cross-border search and investigative measures predominantly MLA-based (judicial cooperation)
 - > limited police autonomy in international cooperation in criminal matters
 - > often proper domestic judicial control required, at least for taking of intrusive, coercive or special investigative measures
 - > pitfall for enthusiast police, if not properly backed up by judiciary (JIT lessons learned)



Passive search

- traditional international notification and alerting
 - merely aimed at
 - localisation
 - provisional arrest in view of
 - extradition or surrender (all fugitives)
 - possibilities
 - international arrest warrants/Interpol red notices
 - alerts based on Article 95 SIC
- most wanted websites?
 - privacy and necessity/proportionality issues
 - especially for suspects, but also for convicted persons
 - latter in particular being unlikely to file complaint though



Moderately active search

- non-traditional alerting (all fugitives)
- alerts aimed at discreet surveillance or specific checks under Article 99 SIC
- creative use or even misuse (not recommendable)
 - requires labeling of the fugitive as a serious (security) threat by the intelligence services
- data on persons (who may lead to detection of fugitives and accompanying persons), objects carried, vehicles, boats, aircraft, searches therein, routes and destinations
- allowing for border, police and customs checks within the Schengen states (i.e. not only at external border)



Genuinely active search (1)

- investigative measures (ordinary and special)
- for suspects: routine instruments available
- for convicted persons
 - domestic law (for int'l law will depend on it)
 - taking of investigative measures traditionally limited to pre-trial (and trial) phases and post-sentencing review procedures (new elements)
 - post-sentencing judicial (independent and impartial) control on (the necessity, proportionality etc, especially of intrusive, coercive or special) investigative measures for fugitive search purposes usually unforeseen



Genuinely active search (2)

- > for convicted persons (continued)
 - > European cooperation instruments in criminal matters
 - > offer hardly any viable possibilities
 - > traditional limitation of scope to the prevention, detection, investigation or prosecution of offences
 - > full quick-scan (see side document)
 - > idem moreover for Eurojust and Europol



Recommendations for EU action (1)

- EU level
 - radical broadening in scope of relevant international assistance & cooperation instruments, Europol and Eurojust to post-sentencing phase
 - also recommended in IRCP judicial cooperation study
 - caveat 1: many techniques relevant for active fugitive search remain unregulated even in currently available instruments
 - coming under the voluntary 'widest measure of assistance' regime
 - whereas, given their intrusive or coercive nature, it is very unlikely that MS will execute them except under relatively strict conditions



Recommendations for EU action (2)

- › examples (non-limitative list): registration of incoming and outgoing telecommunication numbers; interception of so-called direct communications; obtaining communications data retained by providers of a publicly available electronic communications service or a public communications network; withholding and intercepting of mail (and reading it); (cross-border) use of technical devices (electronic/GPS tracking) for the purposes of observation; entry of premises without consent in view of discrete visual control or search; (discrete) photo and video registration etc



Recommendations for EU action (3)

- must be regulated for all phases
 - (= one of the problems of the proposed EIO)
 - caveat 2: in absentia judgements
 - comparable safeguards as in FD on the matter?
 - caveat 3: dependence on domestic law
- MS level: mandatory introduction (at least for EU crimes?)
 - of the possibility to take investigative measures in the post-sentencing phase, at least for FAS purposes
 - of sufficient (independant and impartial) post-sentencing judicial control mechanisms on investigative measures for fugitive search purposes



Recommendations for EU action (4)

- EU external relations level
 - update existing conventions with 3rd countries
 - EU-US MLA convention, Europol-US agreement, ...
 - inter-institutional request to also address the issue at
 - CoE level (CDPC & PC-OC)
 - UN level (UNODC)